UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.

KUMHO TIRES,	)	
	)	
Employer,	)	
	)	
and	)	**10-RC-246475**
	)	
UNITED STEEL, PAPER & FORESTRY	)	
RUBBER, MANUFACTURING, ENERGY	)	
ALLIED INDUSTRIAL & SERVICE	)	
WORKERS INTERNAIONAL UNION	)	
AFL-CIO, CLC	)	
Petitioner.	)	
	)	
	)	

THE EMPLOYER'S REQUEST FOR REVIEW OF ACTING REGIONAL DIRECTOR'S DECISION ON EXCEPTIONS TO HEARING OFFICER'S REPORT

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NOW COMES Kumho Tires, Employer herein, and requests that the National Labor Relations Board grant review of the Acting Regional Director's Decision and Certification of Representative.

GROUNDS FOR REVIEW

Review is warranted on the following grounds:

1. A substantial question of law and policy is raised because the Acting Regional Director mischaracterized the facts presented at the hearing; failed to conduct the required analysis; and improperly determined that a purported incident of violence against a voter, which was disseminated to a determinative number of voters during the critical period, could not affect the outcome of a one-vote election. Specifically, rather than undertaking any legitimate analysis, the Acting Regional Director based the entirety of her Decision on her adoption of the Hearing Officer's finding that the alleged confrontation did not occur, and failed to objectively consider the effect that the disseminated accounts of the incident had on the eligible voters.

2. A substantial question of law and policy is raised because of the Acting Regional Director's departure from officially reported Board precedent regarding the proper interpretation of the "general atmosphere of fear and reprisal" required to set aside an election based on third party conduct. In particular, the Acting Regional Director misconstrued and misapplied the Board's decision in *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984), and in turn, ignored the undisputed evidence that threats of violence were disseminated to a determinative number of voters during the critical period before the election. This particular language of *Westwood Horizons* has been criticized by Board members over the years because it leads to confusion and improper application, and because it fundamentally contradicts the Board's policy of applying heightened scrutiny to close elections. The Board should take this opportunity to clarify the standard.

3. A substantial question of law and policy is raised because the Acting Regional Director erroneously computed the critical period in this case; misapplied Board precedent; and improperly determined that sustained appeals to racial prejudice – including references to eligible Black voters as "slaves" and Korean company owners as "masters" – could not affect the outcome of an election with a one-vote margin.

4. A substantial question of law and policy is raised regarding the continued applicability of the Board's decision in *Sewell Manufacturing Co.*, 138 NLRB 66 (1962), as the 60-year-old rule no longer adequately reflects the modern realities of racial comments in the workforce, and its application has the untenable effect of endorsing conduct that is morally and legally problematic, and at direct odds with other federal statutes. The Board should take this opportunity to construct a new standard that allows for consideration of discrimination laws and the inherent value of preventing discriminatory statements and conduct in an employment setting.

STATEMENT OF THE CASE

This case arises out of a representation petition filed by the United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC ("Petitioner" or "Union") on August 12, 2019, seeking to represent certain employees of Kumho Tires ("Employer") at its Macon, Georgia facility.[1] The parties entered into a Stipulated Election Agreement, which was approved by the Regional Director, and which set forth the appropriate unit:

> All full-time and regular part-time production and maintenance employees, production coordinators, inventory control employees, tool and dye makers and plant clericals employed by the Employer at its Macon, Georgia facility, but excluding all temporary employees, office clerical employees, professional employees, guards and supervisors (including Team Leads) as defined in the Act.

[1] As discussed, *infra*, the facts at issue here relate to the second election held in an uninterrupted organizing campaign. The first election occurred on October 12 and 13, 2017.

An election was held at the Employer's facility on September 5 and 6, 2019, and the initial tally of ballots reflected that, of 311 eligible voters, 141 cast votes for the Petitioner, and 137 cast votes against the Petitioner. In addition, 13 ballots were challenged, a number sufficient to determine the outcome of the election. 22 employees did not vote in the election.

On September 13, 2019, the Employer filed Objections to the election. Subsequently, the Union filed unfair labor practice charges in Cases 10-CA-247965 and 10-CA-248196. On September 19, 2019, the Regional Director issued a Report on Challenges and Notice of Hearing; that hearing began on October 15, 2019, and lasted four days, during which the parties presented a total of twenty witnesses.

On December 30, 2019, Hearing Officer Kerstin Meyers issued a Report on the challenged ballots and recommended that ten of the thirteen ballots be opened and counted. Both the Employer and the Petitioner filed timely exceptions with the Regional Director. On March 5, 2020, the Acting Regional Director issued his Decision on Exceptions to Hearing Officer's Report, finding that all of the challenged employees, except for one, were eligible to vote. The Acting Regional Director ordered that the ballots of eleven employees found eligible (as well as the ballot of one employee stipulated as eligible by the parties) be opened and counted, and that a Revised Tally of Ballots be issued.

The decision of the Acting Regional Director was appealed, but the appeal was denied by the National Labor Relations Board on July 17, 2020. Subsequently, the Board ordered a count of the challenged ballots and final revised tally of the ballots. On August 11, 2020, the Region opened and counted 11 of the 13 challenged ballots, and determined that 145 votes were cast for the Petitioner, and 144 votes were cast against the Petitioner.

On August 18, 2020, the Employer re-filed timely Objections to the Election, as well as Evidence in Support of its Objections. (Exhibit 1: Employer's Objections.) On September 3, 2020, the Acting Regional Director issued a Report on Objections and Notice of Hearing on Objections, and ordered that a Hearing to be held to rule on four of Employer's seven objections. (Exhibit 2: Acting Regional Director's Report on Objections and Notice of Hearing.) As a result of the Coronavirus pandemic, the Hearing was held virtually via Zoom, before Hearing Officer Brenna C. Schertz, on September 30, October 1, 2, 5 and 6, 2020. The Employer withdrew some of its Objections during the Hearing (Objections 1 and 5), with the remaining Objections as follows:

> **Objection No. 2**
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> During the critical period, three representatives of the Petitioner visited an eligible voter at home at 10:30 p.m. Upon arriving, they identified themselves as being agents of the USW. The agents were aware that the voter was a vocal opponent of unionization at Kumho, and one agent expressed his disappointment that the voter had not responded to text messages. The voter ordered the individuals to leave the property; they refused and surrounded the voter on his porch. One agent then mentioned the employee's wife and stated that the employee needed to be concerned for her safety; the interaction culminated in physical violence, and the employee's wife called the police. This incident was widely discussed throughout the plant, and the resulting atmosphere was one of fear and coercion, rendering fair choice impossible.
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> **Objection No. 3**
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> Agents and representatives of the Petitioner and employee supporters of the Petitioner engaged in a systematic attempt to inject racial issues into the campaign and made appeals to racial prejudice among the voters, which improperly affected the election's outcome. This conduct included, but was not limited to, exploiting intolerance and encouraging prejudice against Korean and Chinese workers and management. It also included, but was not limited to, the use of racially charged language by agents of the Petitioner, and repeated references to Kumho employees (a majority of whom are Black) as "slaves" reporting to a master.

Employer and Petitioner timely filed their respective Post Hearing Briefs on October 27, 2020.

On November 10, 2020, Hearing Officer Schertz issued her Report on the Employer's Objections, and recommended that Objections 2 and 3 be overruled. (Exhibit 3: Hearing Officer's Report on Objections.) The Employer timely filed Exceptions to the Hearing Officer's Recommendations on November 24, 2020. (Exhibit 4: Employer's Exceptions.) On January 20, 2020, the Acting Regional Director issued her Decision and Certification of Representative, in which she agreed with the Hearing Officer that the Employer's Objections should be overruled, and the Petitioner certified. (Exhibit 5: Acting Regional Director's Decision and Certification.) For the reasons set forth below, the Employer submits that the Acting Regional Director's Decision was erroneous; that the outcome was prejudicial to the Employer; and that there are compelling and significant reasons warranting the Board's review in this case.

ARGUMENT

1. The Acting Regional Director Failed to Conduct the Appropriate Legal Analysis, And Committed Prejudicial Error in Adopting the Hearing Officer's Factual and Legal Findings Relating to the Alleged Violent Confrontation between a Union Agent and an Eligible Voter.

As set forth in the Employer's Exceptions and Brief in Support of Exceptions (Exhibit 4: Employer's Exceptions) and the facts described therein, at the Hearing, the Employer presented a witness, eligible voter Joe Beaulieu, who testified that Union agents came to his home at night; that they made statements and engaged in conduct which he reasonably believed threatened his wife; that this visit culminated in physical violence; and that he subsequently informed other eligible voters about the incident. (Exhibit 6: Transcript, Pages 41-58.) The Employer presented further evidence that news of the altercation spread quickly throughout the facility. (Exhibit 7: Transcript, Pages 153; 179-180; 244; 293-297) While the Union called witnesses who disputed

that the initial encounter ever occurred, it was unable to dispute that the incident had been discussed among a determinative number of eligible voters.

Ultimately, the Hearing Officer, and subsequently the Acting Regional Director, dismissed Beaulieu's testimony, and concluded that the encounter did not occur. As such, they determined that the threats of violence could not be analyzed under the agency standard, but were better considered as third party misconduct, and subject to a higher burden of proof. Still, while neither the Hearing Officer nor the Acting Regional Director were convinced of the altercation, both conceded that the story had been disseminated to a determinative number of voters.

In all, the Employer submits that the Acting Regional Director adopted numerous erroneous factual and legal findings relating to the evidence presented at the Hearing. These errors were prejudicial, and warrant reconsideration by the Board.[2] For the purposes of this Request, however, the Employer submits that even if that the factual findings were proper, and this situation was appropriately subject to a heightened third party analysis, Review is still warranted, because – despite the fact that this case has been evaluated twice – that analysis has never actually occurred.

Turning to the law, the Board has long recognized that it "is not material that fear and disorder may have been created by individual employees or nonemployees and that their conduct cannot probatively be attributed either to the Employer or to the Union. The significant fact is that such conditions existed and that a free election was thereby rendered impossible." *Al Long, Inc.*,

[2] In the interest of brevity, the Employer will not recite each of its arguments in support of its Exceptions to the Hearing Officer's Report in this filing; however, it incorporates those arguments by reference and reserves the right to raise such issues in subsequent litigation, and does not waive its exceptions, including those exceptions relating to what the Employer submits were improper factual findings and credibility determinations; the erroneous determination of agency status; and the improper failure to consider post-election evidence of witness intimidation and the related vandalization of Employer's witness' property (which included the word "RAT" spray painted on his home and his and his wife's vehicles)(Exhibit 8: Transcript, Pages 58-64; Hearing Exhibits 2 and 3) into account in assessing credibility and demeanor.

173 NLRB 447, 448 (1968). Still, recognizing the lack of control agents have over non-agents, the Board applies different standards to conduct by an agent, and to conduct by a third party; in the instant case, having found that the altercation did not occur, and was therefore not attributable to the Union, the Acting Regional Director agreed with the Hearing Officer that the latter framework should be applied.

In assessing the seriousness of third party conduct, the Board applies the test articulated in *Westwood Horizons Hotel,* which requires consideration of five factors: (1) the nature of the threat itself; (2) whether the threat encompassed the entire bargaining unit; (3) whether reports of the threat were widely disseminated within the unit; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and (5) whether the threat was "rejuvenated" at or near the time of the election. 270 NLRB 802, 803 (1984); *see also, PPG Industries,* 350 NLRB 225, 226 (2007). In a proper analysis of third party election interference under *Westwood,* each of these factors is considered; it is the result of that evaluation that determines whether the conduct was "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood* at 803.

At the same time, even in third party cases analyzed under the *Westwood* framework, the Board continues to set aside elections where interference could have affected a small, but determinative, number of voters. *See, Smithers Tire,* 308 NLRB 72, 73 (1992); *Buedel Food Products Co.*, 300 NLRB 638, 638 (1990); *Steak House Meat Co.*, 206 NLRB 28 (1973). To this end, the Board has found sufficient evidence of election interference even where coercive third party conduct did not affect the majority of the unit. *See, Robert-Orr Sysco Food Services,* 338 NLRB 614, 615 (2002) (setting aside an election where the tally of ballots showed 84 for and 80

against the Petitioner, with 3 challenged ballots, and finding that, "despite his statement to the contrary, the hearing officer did not sufficiently take into consideration the closeness of the election results. Objections must be carefully scrutinized in close elections […] Given the vote spread, a one-vote swing away from the Petitioner would have brought the Petitioner's three challenges into play, potentially changing the outcome of the election—and threats were made to at least five employees and disseminated to at least four more employees").

Here, while the Hearing Officer immediately accepted *Westwood* as the operative law, she wholly failed to apply it. She listed the *Westwood* factors in her Report, but this cursory acknowledgment was the only reference to the standard. She did not specify which evidence she viewed as relevant to any particular factor: there was no discussion of whether the threats could "encompass" the unit, or whether employees could reasonably believe the threat could be carried out; the proximity between the incident and the election was not mentioned. Indeed, other than the boilerplate recitation at the outset of her analysis, the Hearing Officer never referenced any of the *Westwood* factors, or offered any explanation of how they informed her conclusion that the evidence did not create the necessary general atmosphere of fear and reprisal. More critically, in adopting the Hearing Officer's decision, the Acting Regional Director did not mention *Westwood* or the five factors at all: rather, she flatly announced that the necessary analysis had been undertaken, and that the conduct did not rise to a "general level" of fear and reprisal. (Exhibit 5: Decision at 6.) The Employer submits that this constituted clear error.

As the D.C. Circuit has recognized, the *Westwood* test is not subject to abbreviation. Before arriving at a determination as to whether the requisite general atmosphere existed, each factor must be considered individually to determine the overall effect on the voting unit. And, as

that Court warned, anything less than a full examination contradicts Board precedent, and cannot be sustained by a Court of Appeals:

> Rather than analyze these factors as *Westwood Hotel* requires, the Board cursorily acknowledged its own precedent and then dismissed the effect of the threatening statements in a discussion too brief to demonstrate how the facts of this case align with the Board's precedent. Such truncated analysis may often encourage reviewing courts like this one to affirm the Board's decisions because the reasoning is so skeletal as to thwart assessment of its reasonableness. But this habit would shortchange the obligations of reviewing courts. It is the Board that must demonstrate its decisions are consistent with its precedent because, although our standard of review is deferential, it is not meaningless.
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> *ManorCare of Kingston PA, LLC v. NLRB*, 823 F.3d 81, 87 (D.C. Cir. 2016).

As described by the Court, the "truncated analysis" offered by the Board – and the failure to engage in any meaningful examination of the "required" *Westwood* factors – was legally insufficient, and could not be upheld. Still, even the Board's decision in *ManorCare* offered more substance than the Decision in this case. Here, where the Acting Regional Director failed to even mention *Westwood* or its required factors, the argument against adopting those findings is even stronger, as there is no basis upon which her ultimate conclusion can be sustained. The analysis simply was not performed, and it is abundantly clear that the Acting Regional Director did not rely on *Westwood* in adopting the Hearing Officer's Report and overruling the Employer's Objections.

Still, this was not the only inconvenient precedent ignored in the Decision. As described above, another long-standing principle of Board law is that elections must be set aside where threats have been "made or disseminated to voters whose ballots might have been determinative." *Robert Orr–Sysco*, 338 NLRB at 615. While both the Hearing Officer and Acting Regional Director acknowledged that the news of a violent confrontation between Union agents and an eligible voter had been disseminated, and that this news was disseminated to a determinative

number of voters, they made no attempt to reconcile that fact with their finding that the incident could not have affected the outcome of the election.[3] And again, when the Employer excepted to the lack of consideration given to the closeness of the election, the Acting Regional Director offered the following flippant – but telling – response:

> The Hearing Officer provided such careful scrutiny. The Hearing Officer properly focused on the dissemination of the falsified altercation […] and correctly concluded that approximately four bargaining unit employees, at most, heard about some incident involving unidentified Union representatives. It would be irrational to overturn an election, even a one vote election, on one employee's lies about the Union. Beaulieu, who at some point apparently became vehemently against the Union, presumably made up the story to paint the Union in a bad light. The Employer is now arguing that the apocryphal story hurt it rather than the Union. Overturning the election on such grounds is nonsensical.
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> (Exhibit 5: Decision at 9.)

Still, while this response offers little reassurance that the facts were subjected to the heightened scrutiny required in a close election, it provides a great deal of insight into the reasoning

[3] While the Regional Director allowed that the news of the confrontation was disseminated to four eligible voters, in reality (and as set forth in Exhibit 4, the Employer's Brief in Support of its Exceptions), the evidence presented at the Hearing demonstrated that there were more than four employees who knew about the incident. To that end, the Hearing Officer pointed to testimony from eligible voter Billy Hasty, who stated that he learned about the confrontation from "two or three unidentified coworkers." (Exhibit 3: Report at 17.) After speaking to Beaulieu, eligible voter Billy Durden testified that he warned half a dozen eligible employees that people might be coming to their homes. (Exhibit 3: Report at 17.) Maintenance Team Leader Bracey testified that he heard two to four eligible employees discussing the altercation. (Exhibit 3: Report at 17.) Director of Human Resources Keith Lolley testified that "half a dozen" eligible employees approached him to ask about the altercation. (Exhibit 3: Report at 18.) Maintenance Supervisor Brad Asbell testified that he overheard eligible voters discussing the confrontation as he was walking through the plant. (Exhibit 3: Report at 18.) Beyond this, at the hearing, Beaulieu testified that two unknown employees had approached him and asked about the confrontation – including one individual who "made a smartassed comment about how the union took care of [Beaulieu]." (Exhibit 9: Transcript, Page 57.) And, as explained by eligible voter Hasty, "it doesn't take long for something to get around, you know." (Exhibit 10: Transcript, Page 218.) In all, the evidence of dissemination was undisputed, and in a situation where the election results hinged on one vote, it should have carried significant weight in this analysis.

underlying the Acting Regional Director's Decision. In six sentences, she referred to Beaulieu's story as a "falsified altercation," "one employee's lies," "made up," and "apocryphal." What she did not do – and did not even make a pretense of doing – was address the closeness of the vote. Nor did she address the objective impact the story could have had on just one voter, which would have been sufficient to overturn the election results.

It is inescapably clear from the Acting Regional Director's analysis that, rather than evaluating the objective evidence of dissemination and its reasonable effect on the election, her review ended with her determination that the incident in question did not occur. Indeed, this seems to have been a deciding factor in both the Report and the Decision – clearly, neither the Hearing Officer nor the Acting Regional Director believed there was a violent confrontation between Union agents and Beaulieu, and accordingly, they were reluctant to set aside an election based on the spread of an unfounded rumor. The law, however, does not permit this myopic approach.

While the Acting Regional Director dismissed the incident as a lie, this ignores the fact that the eligible voters who heard of the confrontation may have drawn different conclusions. Eligible voters did not have the benefit of holding a hearing, examining witnesses, or reviewing supporting documentation; they either believed their co-worker or they didn't. More importantly, the record establishes that some employees did believe Beaulieu – eligible voter Durden testified that he was sufficiently alarmed by the story that he called "half a dozen [people] or more, at least" and warned them that the Union might come to their houses and try to enter their homes. (Exhibit 11: Transcript, Pages 159-160.) Regardless of truth, the story was disseminated, and it was disseminated to a determinative number of voters. Even if the Acting Regional Director is correct and the attack did not happen, that does not mean that the rumors about the confrontation did not influence the outcome of the election.

The Acting Regional Director's pronouncement that it would be "irrational" to set aside an election based on a false account is again reminiscent of the Board's reasoning in *ManorCare of Kingston*, a case where some "joking" threats of violence went through a series of retellings, and – eventually – began to sound more like threats. Using language similar to the Acting Regional Director's here, the Board initially determined that the election could not be overturned based on fabricated third party comments, and held as follows:

> The objection should not be sustained on what essentially was a version of the "game of telephone." To do so would open the door to objections being substantiated by rumors devoid of any truth, and encourage false attributions in order to influence election outcomes. In the circumstances of this case, statements which were not threats when made, did not, through the repetition by others, become transformed into objectionable conduct.
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> *ManorCare of Kingston PA, LLC*, 360 NLRB 719, 720 (2014).

On review, however, the D.C. Circuit Court of Appeals disagreed, and found the Board's logic to be inconsistent with its precedent. In addition to refusing enforcement based on the Board's failure to conduct a substantive analysis of the *Westwood* factors, the Court noted that the decision suggested an inappropriate subjective review of the disseminated information:

> The Board's test for determining whether a statement constitutes a threat is an objective one. "The test is not the actual intent of the speaker or the actual effect on the listener," but "whether a remark can reasonably be interpreted by an employee as a threat." *Smithers Tire*, 308 NLRB at 72. A threatening statement, "even one uttered in jest," can nonetheless convey a risk to another of serious harm. Here, the Board emphasized the "casual and joking nature" of the original comments and dismissed the threatening content of those remarks as "no more than bravado and bluster." But although [the employees] may have intended their remarks in jest, some employees interpreted the remarks as threats, and it was reasonable for them to do so. That the comments might have originated as jokes is irrelevant. The remarks were threatening, and seriously so. The objective standard demanded by the Board's precedent requires assessing the threats according to what they reasonably conveyed, not what the speakers intended to convey.
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> *ManorCare of Kingston PA, LLC v. NLRB*, 823 F.3d 81, 87–88 (D.C. Cir. 2016).

As the D.C. Circuit pointed out, it is objective impact, and not subjective intent, that must be considered in determining whether an election is fair. And, if a joke can, through repetition, become a threat that renders an election unfair, then the same must be true for a lie.

To flatly ignore the effect of exaggerations and rumor in union campaigns is to ignore reality. In a time when national political elections are plagued by campaigns of misinformation, and when we have seen the violent results of that misinformation, it seems particularly important to recognize this reality. It is both disingenuous and naïve to assert that lies cannot influence voters – indeed, we are overwhelmed with evidence to the contrary. And, while there is little that can be done about the fairness of a political election when voters have been coerced by falsehoods, the Board is not so limited; the Board possesses unique powers that allow it to evaluate the impact that misinformation has on free choice. The Board can right that particular wrong.

What the Board cannot do, however, is turn a blind eye to the coercive effect of disseminated misinformation in a representation election. Regardless of the underlying truth of a third party assertion, there is no support for the notion that a Regional Director can bypass the *Westwood* factors, ignore the closeness of the election, and discount the impact of disseminated information based on a finding that the initial assertion was false. But, to put it simply, that is precisely what happened in this case.

By failing to look beyond this credibility finding, the Acting Regional Director ignored the undisputed evidence presented by the Employer that established that: (1) the incident was comprehended by eligible voters to be a threat of violence at an employee's home; (2) the violence was directed at an outspoken critic of the Union; (3) the threat was disseminated to a determinative number of eligible voters; (4) employees understood that the threat of violence was serious and could have resulted in physical injury to anyone who spoke out or voted against the Union; and

(5) the threat was disseminated during the critical period before the election. If the required standard had been applied, it is difficult to understand how any reasonable finder of fact could conclude that this did not constitute objectionable conduct. If the *Westwood* standard had been applied, it is even more difficult to understand how the dissemination of the threat could not have reasonably affected one vote, and accordingly, the outcome of the election altogether.[4]

Because it is clear that the required analyses in this case were never undertaken, and that the Report and Decision failed to consider the objective impact of the dissemination on the election, the Employer respectfully requests that the Board grant the Employer's Request for Review, and that the election be set aside.

2. The Board Should Clarify the Language of *Westwood Horizons* and Establish that a "General Atmosphere of Fear and Reprisal" does not Require a Heightened Showing of Dissemination to Eligible Voters.

While the Employer disagrees with the Acting Regional Director's findings and conclusions, it recognizes that the errors enumerated above, and the failure to engage in any meaningful analysis of the *Westwood* factors, is largely due to inconsistency in the language of the decision itself. Moreover, as the Board is surely aware, this is not a new problem.

Indeed, previous Board members have long criticized *Westwood* for suggesting the imposition of a burden that does not exist. Former Member Haynes recognized that "there are few phrases in the Board's lexicon that are more misleading than the statement in *[Westwood]* that the

[4] While the Acting Regional Director apparently questions how "the apocryphal story hurt [the Employer] rather than the Union," the Employer notes that she cannot be ignorant of the fact that the ultimate problem here was not whether the Union was painted in a poor light; the problem was that eligible voters could reasonably be afraid that, by expressing support or voting for the Employer, they could also be subject to retaliation and physical violence by Union supporters. This, in turn, could obviously affect the vote, and even discourage employees from casting a ballot at all – indeed, 22 employees cast no ballot in this election. Regardless, the way in which the Regional Director frames this observation further illustrates her refusal to move beyond her factual findings, and underscores the lack of an objective analysis here.

test for objections to third party threats in an election campaign is 'whether the misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.'" *Mastec Inc.*, 356 NLRB 809, 813–15 (2011)(Member Haynes, dissent). To this end, Member Haynes proposed that the phrase, "or at least the word 'general,'" should be abandoned, as it "suggests a requirement of widespread and aggravated misconduct[.]" While Member Haynes recognized that the language had been applied in cases that did, in fact, involve those circumstances, he noted that "the scope of objectionable threats is not so limited[,]" and that Board jurisprudence conclusively established that even third party threats directed at a single employee could justify an election being set aside.

More recently, Member Miscimarra took up the issue, and offered similar criticism. For example, in *Transit Connection, Inc.,* Miscimarra agreed that the conduct at issue was not sufficiently coercive, but nonetheless argued that the phrase "general atmosphere of fear and reprisal" should be abandoned, because "it improperly suggests that an election cannot be set aside unless third-party threats affected nearly all eligible voters, no matter how close the tally and how serious the misconduct." Case 01-RC-145728, 2016 WL 1043189, at *1 (Mar. 15, 2016). Like Member Haynes, Member Miscimarra noted that this misinterpretation could lead to the imposition of a falsely heightened standard, when in reality, the Board has "properly set aside elections based on serious third-party misconduct affecting only a few determinative voters." *Id.; see also, VWR Int'l, LLC,* No. 32-RC-095934, 2015 WL 1940836, at *1 (Apr. 29, 2015)(Member Miscimarra noting his ongoing objection to the confusing language of *Westwood,* and proposing that the references to a "general atmosphere" be abandoned); *XPO Logistics Freight, Inc.*, No. 13-RC-177753, 2016 WL 6649090, at *1 (Nov. 9, 2016)(same); *Equinox Holdings, Inc.*, 364 NLRB No. 103 (2016)(noting, in dissent, that "when applying the *Westwood Horizons Hotel* standard, I

do not believe an election should be set aside only if there is a "general atmosphere of fear and reprisal" […] because this may improperly be interpreted to suggest that an election cannot be set aside unless the offending conduct affected nearly all eligible voters, regardless of how close the tally and how serious the misconduct. In fact, the Board has properly set aside elections based on serious misconduct affecting a determinative number of voters").

Because sufficiently egregious third party conduct can affect the outcome of an election and create a general sense of fear even when the threat itself is not disseminated to all eligible voters, the clarification sought by Members Haynes and Miscimarra is warranted. More importantly, theirs is the only interpretation of *Westwood* that makes sense, and accurately reflects the standard. To this end, if the Board endorses Decisions which rely solely on the overall existence of a "general environment" without examining individual factors, this imposes a threshold inquiry of how many people were "affected" by the conduct. If a party cannot demonstrate that a significant component of voters were affected by the conduct – as here, where the Acting Regional Director categorically dismissed the Employer's exceptions by pointing to her finding that only 4 out of 311 employees heard the rumor – this initial determination would foreclose any consideration of enumerated *Westwood* factors. But this is backwards. Under an authentic reading of *Westwood*, a judge must analyze the seriousness of the threat, the extent of dissemination, and whether voters could reasonably expect the threats to be carried out, and only then can they determine whether a general environment of fear existed. By contrast, the erroneous interpretation – the interpretation which Members Haynes and Miscimarra specifically warned against – provides judges an easy way out, and gives them the ability to simply conclude that a coercive act – no matter how serious, and no matter how violent – cannot overturn an election if it

did not affect a majority. The result of this misreading would reduce *Westwood's* five part inquiry to a single mathematical equation.

Even more troubling, by failing to clarify the language, the Board effectively endorses a third party standard that is, in many modern workplaces, both unattainable and unrealistic, even when considering the most egregious conduct. A rubber stamp on this Decision sets a false bar that is dangerous to the legitimacy of elections, and ignores the fact that third party threats can, and often do, influence individual votes. Again, this is not what was intended by *Westwood*, and this is not a reasonable interpretation of the standard. This is not an approach that reflects the practical realities of industrial life. And it should not be the policy of the NLRB to measure acts of violence with a calculator.

As such, the Employer respectfully submits that the Board should take the advice of Members Haynes and Miscimarra, grant review in this case, and clarify the *Westwood* standard once and for all.

3. The Acting Regional Director Failed to Conduct the Appropriate Legal Analysis, and Committed Prejudicial Error in Adopting the Hearing Officer's Factual and Legal Findings Relating to the Insertion of Racial Prejudice into the Campaign.

In its third Objection, the Employer submitted that the election results should be overturned based on Petitioner's agents and employee supporters engaging in a systematic attempt to inject racial issues into the campaign, and making appeals to racial prejudice among the voters. As described in the Employer's Exceptions, this conduct included exploiting intolerance and encouraging prejudice against Korean and Chinese workers and management; the use of racially charged language; and repeated references to Kumho employees (a majority of whom are Black) as "slaves" reporting to a master. As demonstrated at the Hearing, the majority of the evidence in this regard was obtained through the Facebook posts of Union agents in the months (and, indeed,

years) leading up to the election; as the evidence further established, these posts were published, and visible, to at least 45 eligible voters. Of those, the evidence is conclusive that at least four read, and interacted, with some of the most divisive messages.

In order to appreciate the full effect of this sustained appeal to racial prejudice, the Employer submitted that the relevant evidence could not be limited to those posts occurring after the filing of the August 13, 2019 petition. The facts of this case are unique, and given the continuous nature of the communications – the Union effectively campaigned without interruption beginning with the first petition in 2017 – the Employer argued that it was only appropriate to consider statements made throughout the entire campaign in determining whether they had a coercive effect.

The Hearing Officer dismissed this argument, finding instead that the critical period was limited to the time following the filing of the second petition on August 13, 2019. The Acting Regional Director adopted this determination, adding that "[i]n situations where there have been petitions withdrawn and refiled, the Board has consistently and for a longtime [sic] held that when a subsequent petition is not filed immediately after the withdrawal of a petition, the critical period begins upon the filing of the subsequent petition and not sooner." (Exhibit 5: Decision at 11.) This conclusion, however, misstates the relevant law, and ignores the unique facts of this case.

While the Employer acknowledges that two years elapsed between the filing of the first and second petitions, and the election occurring on September 5-6, 2019 was not actually a rerun election in Case 10-RC-206308, the law is not meant to be applied where there is no discontinuation of a campaign – and, this is particularly true when the Union itself admits that an overlap existed. For example, at the Hearing, the Union's Lead Organizer Alex Perkins testified that the Union started soliciting cards in June or July of 2019, but the Union did not withdraw its

petition in Case 10-RC-206308 until July 19, 2019. (Exhibit 12: Transcript, Page 655-656.) The new petition in this case, 10-RC-246675 was filed on August 13, 2019. Perkins' testimony makes clear that the Union either started soliciting cards for a new election before the petition was withdrawn in 10-RC-206308, or at the very least, almost simultaneously with the withdrawal of the petition in that case. His testimony also lends support for the strong possibility that the Union strategically coordinated the continuation of its campaign, but dismissed the petition in 10-RC-206308, in order to circumvent liability for unlawful actions that occurred prior to the filing of the second petition. In any event, Perkins, an agent of the Union, acknowledged on the record that the Union started soliciting cards prior to or concurrent with the dismissal of the petition in Case 10-RC-206308. Under these circumstances, the Acting Regional Director should, at the very least, have recognized the potential exception to the rule of *Ideal Electric & Mfg. Co.,* 134 NLRB 1275 (1961).[5]

By improperly defining the critical period, the Acting Regional Director's Decision forecloses consideration of the very evidence that is necessary to "appreciate the full flavor of the atmosphere preceding the election[,]" and that evidence which would serve "as background, giving

[5] Additionally, and as asserted by the Employer in Exhibit 4: Brief in Support of its Exceptions**,** it is also settled law that, when there is a second election (as there was in this case), the critical period may be extended. Thus, when a second election takes place following a contested first election, "[u]nder longstanding NLRB precedent, the 'critical period' for a second election—that is, the period the Board will examine when it decides whether to order a new election—runs from the date of the first election to the date of the second election." *Troutbrook Company LLC v. NLRB*, 801 F. App'x. 781, 782 (D.C. Cir. 2020) (citing *Singer Co.*, 161 NLRB 956, 956 n. 2 (1966)); *see also, Star Kist Caribe, Inc.*, 325 NLRB 304, fn. 1 (1998) (holding that "the critical period for a second election commences as of the date of the first election"); *Times Wire & Cable Co.*, 280 NLRB 19, 20 fn.10 (1986). Here, where the Union continued its campaign uninterrupted beginning on October 12, 2017 until September 6, 2019 and the critical period set forth in *Singer* should apply.

meaning and dimension to critical period conduct." *YKK (U.S.A.) Inc.*, 269 NLRB 82 (1984); *see also, Randall, Burkart/Randall Div. of Textron, Inc. v. NLRB,* 638 F.2d 957, 960 (6th Cir. 1981) (holding that,"[d]espite the *Ideal Electric* rule, the Board does consider pre-petition conduct on occasion, but only when there is significant post-petition conduct related to or continuing from pre-petition events"). Moreover, the refusal to consider such evidence poses a particular problem here, where the standard for interference involves establishing a "sustained course of conduct, deliberate and calculated in intensity to appeal to racial prejudice" – indeed, it is difficult to fully demonstrate the "sustained' nature of these appeals when the Acting Regional Director refuses to acknowledge the existence of a full two years' worth of racially inflammatory comments, made or endorsed by Union organizers, during an ongoing and active campaign.

While the Union may have withdrawn and refiled its petition in this case, this ministerial task had no effect on its ongoing organizing efforts at Kumho, and it should not serve to provide the Union with a clean slate, effectively insulating the organizers from the division they spent two years cultivating. Refiling the petition does not suddenly erase the fact that the Union's Lead Organizer Perkins published a post citing Dr. Martin Luther King, Jr, stating that it made him "sick" when a workforce "that is probably 80% African American votes no for a union[,]" and implored people not to "vote against your coworkers who are trying to do better." (Exhibit 13: Hearing Exh. 5.) Refiling the petition did not erase the fact that Organizer Perkins repeatedly used or endorsed language that compared Kumho employees who voted against the Union as having "Slave mentality…Don't upset the master…" (Exhibit 14: Hearing Exh. 11). And, refiling the petition did not erase posts by former employee Mario Smith[6] in which he commented that a

[6] The Employer submits that the Regional Director improperly adopted the Hearing Officer's determination that Smith was not an agent of the Petitioner, as this contradicts Smith's own statements; in a campaign video for Bernie Sanders, Smith categorically identifies himself as an

Kumho employee would continue to "slave for them Koreans[;]"that "niggas need to stop settling for 16[;]" and that people had left the company because "of how the Koreans treat folks and when I say slaving I meant being a mental slave #wake up[.]" (Exhibit 15: Hearing Exh. 8.) More importantly, though, not only did the refiled petition fail to "erase" these posts in some abstract sense (by suddenly eliminating any influence the comments or their collective impact had on eligible voters - a determinative number of whom posted "reactions" indicating that they had seen them), the refiled petition also did not "erase" the posts in a very literal sense – indeed, at the time of the election, the comments remained published and public, and were readily viewable on the personal Facebook pages of the Union organizers. Given the nature of social media, the fact that the statements were made outside the critical period should not have been determinative in this case; above all things, the internet is an archive, and by choosing to keep those posts intact, the organizers certainly knew that they would be visible to eligible voters scrolling through their history. Accordingly, by drawing a line and restarting the clock at the filing of the second petition, the Acting Regional Director fails to consider the practical realities of the internet, and of this case in particular.

But beyond a pointed refusal to look backwards, the Acting Regional Director also fails to look around. To this end, the Decision wholly discounts the fact that the comments made by Union agents were not made in a vacuum. Ultimately, the Employer presented evidence that, over the course of an uninterrupted, multi-year campaign, Perkins and others sought to nurture a divisive

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organizer. (Exhibit 16: Hearing Exh. 16.) Beyond this, of all of the casual employees involved in this campaign, Smith was seemingly the most visible – he frequently interacted with Perkins on social media and he regularly shared information related to the campaign. He also shared photos of him handing out fliers in front of the facility, and described his interactions with voters. (Exhibit 17: Hearing Exh. 14.) From both a legal and practical perspective, Smith held himself out as an organizer, and the eligible employees viewing his posts would reasonably have viewed him in that light.

"us versus them" situation, categorically pitting Black employees against Korean management. Perkins did this, despite the fact that his posts garnered replies suggesting that "NOT BEING UNITED AS A RACE IS WHAT THEY WANTED AND GOT IN THE END**[.]"** (Exhibit 18: Hearing Exh. 6.) Or comments like "But like Harriet Tubman said "I FREED THOUSANDS OF SLAVES; BUT I COULD HAVE FREED THOUSANDS MORE IF THEY KNEW THEY WHERE [sic] SLAVE". *Id.* This narrow view of the evidence also discounts the fact that this particular ongoing conversation – which had over 200 reactions and 100 comments – was seen by at least four members in the voting unit: Kelvin Sanders, Jasmine Edwards, Carrie Hollings, and Katonia Davis. (Exhibit 19: Hearing Exh. 23 and 24.) The dissemination to these individuals is indisputable, as they left comments or reactions indicating not only that they saw the post, but that they agreed or supported the conversation. And these are just the eligible voters whose interaction is documented; there is no way of knowing how many others in the voting the unit may have also seen or been coerced by these racial comments.

Ultimately, the evidence presented by the Employer demonstrated that, beginning with the first election, slavery imagery was invoked on numerous occasions by agents of the Union. Commenters who attempted to defend Kumho or their employment with the company were criticized in racial terms; meanwhile, Organizer Perkins made no attempt to disavow (or even delete) offensive comments, and frequently interacted with those posters in a positive manner, signaling his endorsement of their divisive views. Even during the limited period considered by the Acting Regional Director, in one post, Perkins engaged in a lengthy discussion of race, Colin Kaepernick, and the NFL; apropos of nothing, Perkins inserted Kumho into the discussion, telling Smith that "If one of the people that claimed they supported you started running around here saying that KTG is a great place to work that would be a slap in the face..." (Exhibit 20: Hearing Exh.

10.) Perkins also made no attempts to disavow comments suggesting "a Korean pep rally" (Exhibit 18: Hearing Exh. 14), or those referring to "Chinese bitches[.]" (Exhibit 21: Hearing Exh. 15.) Put simply, this was the tone of the campaign, and Facebook posts and comments were continuous throughout the critical period. Given the reality that, at the time of the election, 82% of Kumho's production employees were Black, it is clear that this ongoing messaging by an experienced Union organizer was not unintentional. (Exhibit 22: Transcript, Pages 299, 300).

Indeed, the cumulative evidence presented by the Employer presents a full picture of the carefully cultivated and sustained appeal to racial prejudice in this campaign. There can be no question that these words were calculated to play on racial tensions that existed in society at the time they were made – particularly during a four-year presidency that was highly-focused on racial inequities in the United States. There is similarly no question that one of the Union's central messages was one of division, pitting the Black employees against the Korean owners, seeking to exploit the rift for its organizing purposes, and shaming those who did not support the Union as "slaves" beholden to a "master." In a one vote election, that kind of pressure upon members of an overwhelmingly Black voting unit that is inherently coercive. As such, these appeals should have been carefully scrutinized; once again, however, they were not.

In adopting the Hearing Officer's Report and dismissing the Employer's exceptions, the Acting Regional Director acknowledged that, while Perkins's comments could be considered "isolated, prejudicial remarks," she concluded that these were insufficient to set aside the election. (Exhibit 5: Decision at 9.) Similarly, applying the third party standard for misconduct to Mario Smith, the Acting Regional Director determined that his comments "did not so inflame and taint the atmosphere in which the election was held that a reasoned basis for choosing or rejecting a

bargaining representative was a possibility." (Exhibit 5: Decision at 8.) The Employer submits that these findings constituted clear error.

The standard for determining whether a party has engaged in inappropriate appeals to racial prejudice is contained in the Board's *Sewell Manufacturing* decision. In that case, the Board set a series of ground rules for racial campaign communications, establishing as follows:

> So long […] as a party limits itself to truthfully setting forth another party's position on matters of racial interest and does not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals, we shall not set aside an election on this ground. However, the burden will be on the party making use of a racial message to establish that it was truthful and germane, and where there is doubt as to whether the total conduct of such party is within the described bounds, the doubt will be resolved against him.
>
> *Sewell Mfg. Co.*, 138 NLRB 66, 71-72 (1962)(footnote omitted).

Applying Sewell to the instant case, the Union has made no showing that comments about Black slaves and Korean masters were germane to its campaign message – nor can they make that showing, because it would be ludicrous to assert that such characterizations were anything other than an inflammatory appeal to racial prejudice. This language is indefensible, and it is categorically the kind of "out of bounds" speech that should serve to overturn an election.

While the Acting Regional Director clearly disagreed with this conclusion, she offered little in her own analysis, citing to *Shawnee Manor*, 321 NLRB 1320 (1998) and *Beatrice Grocery Products*, 287 NLRB 302 (1987) for the proposition that the Union's conduct was lawful. These cases, however, are both easily distinguishable. In *Shawnee Manor,* the employer objected to one employee telling other employees that "she thought some of the Employer's nurses treated black employees worse than white employees[,]" and were there were rumors that the election was a "black-white" issue. But suggesting that disparate treatment may exist in a workplace is a far cry from actively stoking resentment and using racial slurs, and this case has no application here.

Meanwhile, in *Beatrice Grocery Products*, the Board found that a union representative's statement involving an alleged racial appeal to employees did not warrant setting the election aside,"[b]ecause the statement represented an effort to denounce racial prejudice in another (the Employer), rather than to incite prejudice against a particular racial or religious group[.]" 287 NLRB at 303. This case also has no relevance where Union representatives compared non-union Black employees to slaves, and Koreans to masters. Unlike the facts described in *Beatrice Grocery*, the intent here was not to unite – it was, very pointedly, to divide.

The Employer submits that the facts presented in the instant case align more closely to those of *M & M Supermarkets, Inc. v. NLRB*, 818 F.2d 1567, 1573-1574 (11th Cir. 1987), in which the Eleventh Circuit denied enforcement of a Board order where, during a company meeting, an employee interrupted and announced that "Blacks were out in the cotton field while they, the damned Jews, took their money from the poor hardworking people[,]" and demanded to speak to the Jewish company owner. Contrary to the Board, the Court concluded that the employee's reference to his employers as "those damned Jews" violated the principles of *Sewell*, and was sufficient to invalidate election. Similarly, in *KI (USA) Corp. v. NLRB*, 35 F.3d 256, 260 (6th Cir. 1994), the Sixth Circuit Court of Appeals denied enforcement of a Board order where the union circulated a letter suggesting that Japanese employers thought American employees were lazy. In setting that election aside, the Court specifically noted that "the Union's 'negative stereotyping of [the] Japanese .... has [no] legitimate place in a representation election conducted by th[e] Board.'"

In reality, the posts made by Union organizers in this case had nothing to do with any legitimate campaign issues. To the contrary, their sole purpose was to inflame racial tensions among a largely Black voting unit. In a situation where one single vote determined the outcome of the election, the Board cannot plead ignorance to the impact that these words were designed to

deliver. At the same time, the Board should not have to rely on decades-old law in order to interpret the complex realities of race in the modern workplace.

4. The Board Should Reconsider the Standard Contained in *Sewell*, and Craft a New Framework that Weighs Federal Discrimination Law, and More Accurately Reflects the Modern Employment Relationship.

The unfortunate truth is that the broad language of *Sewell* has led to a patchwork of questionable decisions relating to racial themes in campaigns. For example, in 1999, the D.C. Circuit Court of Appeals considered a case in which the employer argued that a union had systematically excluded Black employees from its organizing efforts, choosing to focus on Hispanic employees instead, and purposefully inflaming racial prejudices within the workplace. *Family Serv. Agency San Francisco v. NLRB*, 163 F.3d 1369, 1379 (D.C. Cir. 1999). In reluctantly agreeing with the Board that, under *Sewell*, such divisive conduct was permissible, the Court "stress[ed] that we do not endorse what appears from most accounts to have been a palpable disinterest by the Union in non-Latino workers and the resulting de facto segregation of employees during the organizing drive. Yet even considering this lamentable behavior towards African-American workers, we nonetheless agree with the Board that there was nothing in this tendentious campaign that made 'impossible a sober, informed exercise of the franchise.'" This decision is, quite simply, bad law, but it clearly demonstrates the ways in which the *Sewell* standard renders unpredictable – and at times, unreasonable – results.

When it comes to matters of discrimination, Board law has not caught up with the rest of the world, and as a result, practitioners must attempt to draw parallels between a modern workforce and precedent from a dramatically different time. Indeed, the cases cited by the Acting Regional Director in her Decision were decided in 1998 and 1987 – meaning that the most recent comparator the Region provides for determining the impact of racial messaging on an election is over two

decades old. Even more problematic is the fact that *Sewell Manufacturing* itself – a case decided in 1962, two years before the passage of the Civil Rights Act – remains the operative standard, and continues to be applied today.

In truth, the jurisprudence of *Sewell* and its progeny provides little opportunity for the Board to recognize the complex and modern legal realities of prohibited harassment and discrimination in the workplace.[7] And, while the Board has endeavored to reconcile other federal laws and agency approaches with its own legal precedent, the fact remains that the operative standard for analyzing coercive behavior should, at the very least, provide a vehicle for recognizing, and giving weight to, legal liability under concurrent employment statutes. Employees should not have to endure, and employers should not have to tolerate, conduct which would constitute a violation of other employment laws, simply because that same conduct may be permissible under the broad language of *Sewell.* The Board needs a better vehicle for addressing these important matters, and as such, the Employer respectfully submits that the time has come to reconsider *Sewell,* and the Board's approach to the injection of racial appeals to a campaign.

[7] *See,* Michael H. LeRoy, *Slurred Speech: How the NLRB Tolerates Racism,* 8 Colum. J. Race & L. 209, 235, 262 (2018)(noting that "the NLRB's toleration of racist speech undercuts hostile work environment standards in Title VII[,]" and recognizing "earlier studies that flagged this concern as long as 40 years ago[;] conducting a survey of Board and Court jurisprudence and determining that, ["t]aking the totality of these rulings – all of which occurred after *Sewell's* policy for regulating racially inflammatory speech – the Board showed no ability to distinguish between epithets and stray remarks, on the one hand, and slurs that aimed to bait and divide workers along racial and ethnic lines, on the other. In short, the first observable trend is that the NLRB's *Sewell* policy is rarely enforced. The policy is virtually meaningless[;]" and ultimately warning against precedent which could enable the rise of white supremacy in organizing campaigns).

CONCLUSION

After years of being subjected to a campaign of deliberately manufactured racial division, and after hearing about a confrontation involving a vocal critic of the Union, Kumho employees cast their ballots with two thoughts in mind: that opposing the Union meant having a slave mentality; and that opposing the Union could be dangerous.

The cumulative effect of the issues affecting the election at Kumho Tires rendered a free choice impossible, and the only way the Acting Regional Director avoided this conclusion was by ignoring both the law and the evidence. To this end, she failed to apply the required *Westwood* factors, and refused to acknowledge years of inflammatory racial messaging. Had she engaged in the proper analysis, or considered the full record, a contrary conclusion would have been inescapable; indeed, had she simply applied the heightened scrutiny that is required in close elections, she could not have so summarily dismissed the undisputed evidence of impropriety, its dissemination to a determinative number of voters, and its inherently coercive effect. She could not have ignored the fact that the appeals to racial prejudice, or the rumors of violence, could certainly have had an impact on just one vote – and just one vote would have changed the outcome here.

Still, this election highlights not only the problems with departing from precedent, but also, the problems with the precedent itself. The confusing "general atmosphere" language of *Westwood* allows for the imposition of a fabricated, heightened burden on third-party conduct that is in direct contravention of Board jurisprudence, and which discounts the legitimate harm that third party conduct can have on election integrity. Moreover, the expansive and outdated language of *Sewell* leaves the Board without an appropriate mechanism for addressing racial appeals in campaigns, and leads to problematic outcomes. Here, where both cases were misapplied, the

resultant Decision is erroneous as a matter of law. Indeed, this Decision does not reflect the reality of this election. It does not recognize the intimidation that a reasonable Kumho employee would have felt when casting their ballot, and it does not acknowledge that that intimidation only needed to affect one vote. Given all that these employees were subjected to, the Board cannot fairly say that the objectionable conduct could have had no impact on the outcome.

As such, for the reasons set forth herein, the Employer respectfully requests that its Request for Review be granted.[8]

Dated this 2nd day of February, 2021.

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[8] In the interest of preserving the full record and for the convenience of the Board, in addition to the Exhibits described in this Request for Review, the Employer has also filed Exhibit 23: Hearing Transcript, Day 1; Exhibit 24: Hearing Transcript, Day 2; Exhibit 25: Hearing Transcript, Day 3; Exhibit 26: Hearing Transcript, Day 4; and Exhibit 27: Employer's Combined Hearing Exhibits.

CERTIFICATE OF SERVICE

This is to certify that I have electronically filed the above **Employer's Request For Review** with the National Labor Relations Board's e-filing service. I have also emailed a copy to the parties listed below:

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Dated this 2nd day of February, 2021.

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